January 5, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Hammond

Date of Filing: December 6, 2004

Case Number: TFA-0079

On December 6, 2004, Richard Hammond (the Appellant) filed an Appeal from a final determination that the Western Area Power Administration (WAPA) of the Department of Energy (DOE) issued on November 1, 2004. In its determination, WAPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require WAPA to release the information it withheld and to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated April 15, 2004, the Appellant submitted a FOIA request to WAPA for documents including copies of all Equal Employment Opportunity-related (EEO) settlement agreements between complainants and WAPA made between January 1999 and March 2004. Determination Letter dated July 15, 2004, from Liova D. Juarez, General Counsel, FOIA, WAPA, and Privacy Act Officer, to Richard Hammond. On July 15, 2004, WAPA responded that it had identified a number of documents as responsive to the Appellant's request. *Id.* at 1. In that Determination, WAPA indicated that it was releasing them to the Appellant after withholding portions of the documents in accordance with Exemption 6 of the FOIA. *Id.* The Appellant filed an Appeal with this office that was denied in part, granted in part, and remanded to WAPA with instructions to either release

some of the information or issue a new determination justifying its withholding. *Richard Hammond,* Case No. TFA-0069, 29 DOE ¶ 80,152 (2004).

In its second Determination Letter, issued on November 1, 2004, WAPA released some additional information, but withheld information setting forth the terms and substance of the settlement agreements as exempt from disclosure under Exemption 5. WAPA claimed that the information contained material that was prepared in anticipation of pending litigation. Determination Letter dated November 1, 2004, from Liova D. Juarez to Richard Hammond (November 1, 2004 Determination Letter). The Appellant filed this Appeal, claiming first, that the search was inadequate, and second, that the information WAPA withheld should not be considered to have been prepared in anticipation of litigation. Appeal Letter dated November 30, 2004, from Richard Hammond, to Director, Office of Hearings and Appeals (OHA), DOE.

II. ANALYSIS

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We contacted WAPA to determine what type of search was conducted. WAPA informed us that it searched its computer system using keywords. In addition, WAPA conducted a hand search of documents, including those that were waiting to be archived or were already archived. WAPA only searched for EEO settlement agreements, as requested by the Appellant. The Appellant argues that WAPA provided only 15 settlement agreements, far below what he believes an office with 11 employees should have handled. In addition, he stated that no settlement agreements were provided where the complainant was represented by a specific law firm in Lakewood, Colorado. WAPA responded that its EEO office works on many types of cases, not just EEO-related settlement agreements, including Merit Systems Protection Board (MSPB) and Federal Labor Relations Authority (FLRA) cases. Further, although the law firm does represent individuals before WAPA, it is possible that the individuals represented by this firm did not reach settlements with WAPA, that the firm did not represent anyone during the time period for which the Appellant is requesting the information, or that the firm represented an individual or individuals in areas other than EEO, such as MSPB or FLRA claims.

WAPA's search did not locate any settlement agreements involving the specific firm, and the Appellant has not produced convincing evidence that additional responsive documents exist. Given the facts as they were presented to us, we are convinced that WAPA followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request.

None of the Appellant's arguments convinces us otherwise. The Appellant's allegation regarding the particular number of employees working in the EEO office does not provide any new information that would direct WAPA to a new place to search or convince us that additional relevant documents exist. Further, the information that a specific law firm represents individuals before WAPA does not provide information sufficient to suggest that additional settlement agreements exist. As stated above, we believe that WAPA's search was reasonably calculated to discover responsive documents. Accordingly, this part of the Appeal should be denied.

B. Exemption 5-Deliberative Process and Predecisional Documents

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates every civil discovery privilege which the government enjoys under statutory and case law. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 7799 (1983); *FTC v. Grolier*, 462 U.S. 16, 19-27 (1983); *Renegotiation Board v. Grumman Aircraft & Engineering Corp.*, 421 U.S. 164, 184 (1975). Therefore, any communication that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. *Id.* Accordingly, if the requested documents fall within a civil discovery privilege, they may be withheld under Exemption 5.

In its second determination, WAPA withheld the terms and conditions of the majority of the settlement agreements. The terms and agreements are the substance of the agreement between the parties. We believe that these portions of the settlement agreements may be withheld under the privilege for settlement negotiation papers incorporated within Exemption 5. Federal courts ruling squarely on the issue have held that such documents are privileged from discovery. The federal courts have held that information prepared by attorneys "in contemplation of litigation,"*Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980), includes documents relating to possible settlements of litigation. *See, e.g., United States v. Metropolitan St. Louis Sewer District,* 952 F.2d 1040, 1045 (8th Cir. 1992). Specifically, the courts have also recognized a separate civil discovery privilege for information relating to settlement negotiations. *See, e.g., Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 445, 449 (S.D.N.Y. 1985). In light of the case law, OHA has determined that settlement documents are privileged and therefore exempt from mandatory disclosure. *Information Focus on Energy*, 26 DOE¶ 80,192 (1997) (*IFOE*); *Peter T. Torell*, 15 DOE ¶ 80,127 (1987) (*Torell*). In reaching these determinations,

we have concluded that the privilege exists, in large part, to encourage full disclosure between the parties involved in order to promote settlements rather than continued litigation. *Torell* at 80,576.[*/] Promotion of this important objective would be harmed if these documents were released. We therefore conclude that WAPA properly withheld information relating to the settlement agreements.

III. THE PUBLIC INTEREST

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. The Appellant argues that release would be in the public interest. Appeal Letter at 2. We disagree. The release of individual settlement agreements would result in foreseeable harm to the interests that are protected by the settlement negotiation privilege. *IFOE* at 80,794. An opposing party could gain substantial benefit (and cause corresponding detriment to an agency) if the party could obtain work product generated by an agency in connection with earlier settlements. The party could unfairly gain insight into the agency's strategic and tactical approach to deciding what terms may be offered and accepted by the agency. The release of these agreements could compromise the DOE's efforts at negotiating future settlements in similar cases.

IV. CONCLUSION

WAPA properly withheld portions of the documents under the Exemption 5. Further, we believe the search that was conducted was adequate. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Richard Hammond on December 6, 2004, Case No. TFA-0079, is hereby denied.

[*/] In an alternative analysis discussed in *Las Vegas Review-Journal*, Case No. TFA-0007, 28 DOE ¶ 80,273 (2003), OHA held that settlement agreements and information reflecting the settlement amount or other terms of the agreement are attorney work product, and therefore exempt from mandatory disclosure. *Id.* at 4.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 5, 2005